

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

SCOTT ALAN THATCHER,

Defendant-Appellant.

UNPUBLISHED

July 10, 2003

No. 239373

Ingham Circuit Court

LC No. 01-076930-FC

Before: Neff, P.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of one count of first-degree home invasion, MCL 750.110a(2), and two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f). He was sentenced to 100 to 240 months' imprisonment for the home invasion conviction, to be served consecutive to concurrent prison terms of 200 to 400 months each for the CSC I convictions. He appeals as of right. We affirm.

I

In the sole issue presented in defendant's principal brief on appeal, he argues that the trial court abused its discretion by ordering his prison sentence for first-degree home invasion to be served consecutively to his sentences for CSC I. We disagree. MCL 750.110a(8) provides that a court "may" order a term of imprisonment imposed for first-degree home invasion "to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction." The use of the term "may" designates discretion. *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 253 Mich App 263, 297; 655 NW2d 263 (2002). Thus, we review the trial court's decision to impose a consecutive sentence for an abuse of discretion, which is found "only if an unprejudiced person, considering the facts upon which the trial court made its decision, would conclude that there was no justification for the ruling made." *People v Miller*, 198 Mich App 494, 495; 499 NW2d 373 (1993). The first-degree home invasion and CSC I sentences are based on circumstances that, according to the complainant's testimony, involved defendant binding the complainant's hands and sexually penetrating her twice in the presence of their young child. In light of the heinous nature of this conduct, the trial court did not abuse its discretion by ordering the first-degree home invasion sentence to be served consecutively to the CSC I sentences. Imposing the more severe consequence of consecutive, rather than concurrent, sentencing was reasonable given the nature of defendant's criminal actions.

We reject defendant's argument that the Legislature intended consecutive sentencing for first-degree home invasion to be reserved for circumstances where a defendant commits a crime in addition to the crime initially contemplated when the defendant broke into a dwelling. No such limitation is stated in the statute. Rather, the plain language of MCL 750.110a(8) gives trial courts expansive discretion to order a sentence for first-degree home invasion to be served consecutively to *any* other criminal offense committed *during the same transaction*. To be found guilty of first-degree home invasion, the trier of fact must conclude beyond a reasonable doubt that defendant intended to commit a felony, larceny, or assault as well as the breaking and entering, or entering without permission of the dwelling. *People v McCrady*, 224 Mich App 27, 32; 624 NW2d 761 (2000). Therefore, it necessarily follows that the Legislature intended for trial courts to have the discretionary authority to order a sentence for first-degree home invasion to be served consecutively to a sentence for another crime committed during the same criminal transaction.

II

Defendant presents several issues in his pro se supplemental brief. First, he argues that trial counsel was ineffective for various reasons. We disagree. Because defendant did not raise his ineffective assistance of counsel claims below, our review is limited to mistakes apparent from the existing record. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001). To establish ineffective assistance of counsel, a defendant must, at a minimum, show that (1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability that the outcome of the proceeding would have been different but for trial counsel's errors. *People v Kevorkian*, 248 Mich App 373, 411; 639 NW2d 291 (2001).¹

Defendant argues that trial counsel was ineffective for failing to obtain discovery of the "alleged DNA LAB Report used against [him] at trial." However, defendant indicates that a remand to the trial court for an evidentiary hearing is necessary to show "the exact nature" of this claim. Thus, we conclude that defendant is not entitled to relief based on this matter because his claim is not supported by the existing record. *Watkins, supra*.² Further, we decline to order a remand for an evidentiary hearing because defendant did not file a timely motion to remand as required by MCR 7.211(C)(1). Because the victim in this case knew her attacker, we conclude that there is no reasonable probability that earlier discovery of the DNA test results would have led to any new evidence. Similarly, while defendant faults trial counsel for failing to attempt to

¹ This panel is not unmindful of the more stringent standards set forth in *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In *Rodgers*, the panel indicated that, in addition to these two requirements, ineffective assistance of counsel requires a showing that "the attendant proceedings were fundamentally unfair or unreliable." Because we conclude that defendant is not entitled to relief under the more lenient *Kevorkian* standard, we need not address this inconsistency in this Court's jurisprudence.

² With regard to this and other aspects of his ineffective assistance of counsel claim, defendant has attempted to inappropriately expand the record on appeal by relying on certain attachments to his supplemental brief. We do not consider these extra-record materials because of the requirement that we limit our review to the existing record.

locate an expert DNA witness, defendant has not shown even a reasonable probability that the incriminating DNA evidence could have been undermined. Therefore, defendant has not established a claim of ineffective assistance of counsel.

Defendant claims trial counsel was ineffective for failing to secure him a speedy trial. However, he does not explain how trial counsel was allegedly responsible for any inappropriate delay in bringing defendant to trial. Thus, defendant has not established that counsel's performance was below an objective standard of reasonableness in this regard. *Kevorkian, supra*. Defendant also states that trial counsel failed to adequately brief and argue his assertion of his right to a speedy trial. We disagree for reasons set forth in this opinion.

Defendant further argues that trial counsel was ineffective in (1) failing to adequately impeach the testimony of the complainant and her father based on discrepancies in their testimony, (2) advising defendant to waive a jury trial, (3) failing to locate and call certain alleged alibi and character witnesses, and (4) failing to request the trial court to examine the alleged crime scene. We disagree because we conclude that there is no reasonable probability that counsel's alleged deficient performance affected the outcome of the trial in light of the overwhelming evidence of defendant's guilt. With regard to the CSC I convictions, the complainant testified that defendant awakened and sexually assaulted her while she was in bed. DNA testing corroborated this by indicating that defendant was the source of the genetic material recovered from a vaginal swab of the complainant. Evidence presented from a doctor that abrasions in the complainant's genital area evinced forcible penetration and were inconsistent with consensual sex. As to defendant's home invasion conviction, a police officer testified seeing a broken window at the residence where the incident occurred and the complainant's parents testified that they had closed and locked the doors to the house when they left for work on the morning of the incident. In light of this overwhelming evidence of guilt, defendant has not shown a reasonable probability that different conduct by trial counsel with regard to examining or calling witnesses or asking the trial court to view the scene of the incident would have changed the outcome of the trial, or that the outcome would have been different if the case had been tried before a jury.

Finally, defendant claims that he was deprived of the effective assistance of counsel by trial counsel's failure to clearly explain the nature of a plea agreement allegedly offered by the prosecution during the course of trial so that he could consider whether to accept the agreement. Defendant is not entitled to relief based on this claim because it is not supported by record evidence. *Watkins, supra*. Nor is defendant's claim that he was denied access to the crime scene supported by the record.

III

Defendant argues at greater length that the prosecution violated his constitutional right of confrontation by cross-examining him regarding a confession that he allegedly made to a fellow jail inmate, when no actual evidence of the alleged statements was presented at trial. The prosecution concedes that this questioning was improper, but argues that defendant is not entitled to relief under the standard for unpreserved, nonstructural constitutional error. While we question the necessity of this line of questioning given the overwhelming evidence presented against the defendant we hold that because defendant did not object to the questioning at issue, this is an unpreserved matter for which this Court may grant relief only for plain error that

resulted in the conviction of an actually innocent defendant or that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). In light of the overwhelming evidence of guilt, defendant has not shown that any error with regard to the questioning at issue warrants relief under the *Carines* standard. We note that, even if this matter had been preserved by objection, we would still conclude that the error was harmless beyond a reasonable doubt in light of the overwhelming evidence of guilt. See *People v Spinks*, 206 Mich App 488, 493-494; 522 NW2d 875 (1994) (denying relief based on violation of right of confrontation where error was harmless beyond a reasonable doubt).

IV

Defendant argues that there was insufficient evidence to support his convictions of two counts of CSC I and one count of first-degree home invasion. In deciding whether there was sufficient evidence to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and decide whether any rational factfinder could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002). Here, however, defendant's sufficiency argument is essentially predicated on his attack on the credibility of the complainant's testimony at trial. Such an attack on credibility does not support a finding of insufficient evidence to support a conviction because, in considering evidence in a light most favorable to the prosecution, we cannot determine which testimony to believe, but rather must resolve all testimonial conflicts in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Thus, defendant has not established his insufficiency of the evidence claims.

Further, CSC I, as charged in both counts in this case, consists of sexual penetration accomplished through force or coercion and causing personal injury to the victim. MCL 750.520b(1)(f). The complainant testified that defendant vaginally penetrated her with his penis twice, the first time without her consent while her hands were bound and mouth covered with duct tape and the second time without her consent and despite her demand to stop five times. This was sufficient evidence to support a finding that defendant twice sexually penetrated the complainant by force or coercion. As to the requirement of personal injury, such injury includes bodily injury or mental anguish. *People v Mackle*, 241 Mich App 583, 596; 617 NW2d 339 (2000). In this regard, physical injuries need not be permanent or substantial. *Id.* Medical testimony indicated that there were lacerations in the complainant's genital area that were consistent with forcible penetration. Notably, personal injury inflicted during a single episode may be used to provide the element of personal injury necessary for multiple counts of CSC I based on multiple sexual penetrations. *Id.* at 597-598; *People v Martinez*, 190 Mich App 442, 444-445; 476 NW2d 641 (1991). Thus, there was sufficient evidence of personal injury in connection with two forcible sexual penetrations to support defendant's convictions of two counts of CSC I.

With regard to defendant's conviction of first-degree home invasion, this crime encompasses breaking and entering a dwelling and at any time committing a felony while present in the dwelling. MCL 750.110a(2). Based on the testimony of the complainant's parents that they had closed and locked the doors to the house when they left for work on the morning of the incident, there was sufficient evidence that defendant broke into and entered the dwelling at the time of the incident. Moreover, there was evidence of a broken window. As discussed above,

there was sufficient evidence that defendant committed two acts of CSC I after entering the dwelling. CSC I is, of course, a felony. MCL 750.520b(2). Thus, there was sufficient evidence to support defendant's conviction of first-degree home invasion as well as his two convictions of CSC I.³

V

Defendant argues that the prosecution committed a discovery violation by failing to timely provide the defense with the results of the incriminating DNA testing. However, this issue was not raised below and the existing record does not substantiate defendant's claims regarding the dates when information was provided to the defense. Thus, there is no plain error that can form the basis for relief based on this unpreserved issue. *Carines, supra*. Further, in light of the overwhelming evidence of guilt, any error in this regard does not provide a basis for relief because defendant has not shown that it resulted in the conviction of an actually innocent defendant or that it seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

Defendant also indicates that trial counsel was ineffective for failing to raise this issue below, but the existing record does not provide any evidence to support such a claim. *Watkins, supra*. Thus, defendant is not entitled to relief based on this issue.

VI

Finally, defendant argues that the trial court erred by denying his motion to dismiss the charges against him based on either (1) the "180-day rule" of MCL 780.131 and MCR 6.004(D) or (2) the constitutional right to a speedy trial.⁴ We disagree.

With regard to the 180-day rule, MCR 6.004(D) generally requires criminal charges against a state prison inmate or a person "detained in a local facility awaiting incarceration in a state prison" to be brought to trial within 180 days from the time that a prosecutor knows the person against whom such charges are pending is a state prison inmate or the Department of Corrections knows or should know such charges are pending against the inmate. Here, however,

³ Indeed, as we have indicated previously, there was not only sufficient evidence to support defendant's convictions, but overwhelming evidence of guilt.

⁴ The prosecution addresses this issue as if defendant only presents a constitutional speedy trial issue. However, we believe that the 180-day rule issue is fairly raised by defendant's references to the "statutory . . . right to a speedy trial" and to MCR 6.004. Also, while the prosecution argues that defendant did not preserve his claim that he was denied a speedy trial below, we assume without deciding that trial counsel's statement that, "It's [defendant's] position that the delay is a denial of a speedy trial" in connection with the 180-day issue was sufficient to preserve defendant's constitutional speedy trial claim if preservation of this claim below was required. We note that whether a defendant has asserted the right to a speedy trial is articulated as only one factor in determining whether a violation of that right has occurred, *People v Holtzer*, 255 Mich App 478, 491-492; 660 NW2d 405 (2003), which implies that such a claim need not be expressly preserved by objection below in order to be presented on appeal.

the record reflects that defendant was a state prisoner, as opposed to a county jail inmate, for only 171 days between the time of his arrest on the present charges and the start of the trial in this case. Defendant attempted to invoke the 180-day rule below by adding time that he was held in jail pending trial on the present charges, which would make the total time exceed 180 days. However, a jail inmate is not an inmate of a state penal institution for purposes of the 180-day rule. *People v Metzler*, 193 Mich App 541, 545; 484 NW2d 695 (1992). While MCR 6.004(D)(1) does include time that a person is detained in a local facility “awaiting incarceration in a state prison” for purposes of the 180-day rule, defendant was not held in the county jail in this case awaiting incarceration in a state prison, but rather was awaiting trial in the present case. Thus, contrary to defendant’s position, he has not established a violation of the 180-day rule in this case because he was a state prisoner for less than 180 days during the relevant time period.

With regard to defendant’s speedy trial claim, the time period between the date of the charged crimes and the trial was less than eighteen months. Thus, the burden is on defendant to show actual prejudice from the delay in order to establish a violation of his constitutional right to a speedy trial. *People v Holtzer*, 255 Mich App 478, 492; 660 NW2d 405 (2003). Defendant articulates as his claim of prejudice “the fact that the delay by the prosecution in producing the DNA evidence and the production of its expert’s report, denied the Defendant or his Counsel any reasonable time to prepare for his defense.” However, any delay in bringing defendant to trial obviously did not require a delay with regard to the distinct matter of when the prosecution provided the defense with information about the DNA evidence. Further, there is no reasonable possibility that the delay could have significantly prejudiced the defense at trial in light of the overwhelming evidence of defendant’s guilt. Accordingly, defendant’s constitutional right to a speedy trial was not violated.

Affirmed.

/s/ Janet T. Neff
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello